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FILED
 00 MAR 21 PM 3:37
 U.S. BANKRUPTCY CT.
 SO. DIST. OF CALIF.

5 Attorneys for Debtor
SARA NEWSOME BURNS

8 **UNITED STATES BANKRUPTCY COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 In Re:)	CASE NO. 99-33191-B7
11 SARA NEWSOME BURNS , an individual,)	ERRATA TO:
12 Debtor.)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF MOTION
)	TO AVOID JUDICIAL LIEN PURSUANT
)	TO 11 U.S.C. § 522(f) filed 12/23/99
)	
)	Date: April 10, 2000
)	Time: 10:30 a.m.
)	Dept: Four (4)

17
 18 To the Court, Creditor Bradley L. Proulx and whom ever else it may concern:

19 Sara Newsome Burns, Debtor herein, hereby files an errata to the "Memorandum Of Points
 20 And Authorities In Support Of Motion To Avoid Judicial Lien Pursuant To 11 U.S.C. §522(f)"
 21 (hereafter "Memorandum") she filed in this case on December 23, 1999, the hearing upon which is
 22 scheduled to be heard on April 10, 2000 in Department 4 of the above referenced court.

23 The amount of Sara Newsome Burns' homestead exemption was erroneously set forth in the
 24 Memorandum as \$50,000 when she is entitled to a \$125,000 exemption pursuant to CCP
 25 §704.730(a)(3)(B). Schedule C of her Schedules was amended to reflect the correct exemption
 26 amount of \$125,000 on March 14, 2000. A true and correct copy of that Amendment is attached
 27 hereto as **Exhibit "A."** Attached hereto as **Exhibit "B"** is the "Restated Memorandum Of Points
 28 And Authorities In Support Of Motion To Avoid Judicial Lien Pursuant To 11 U.S.C.

ORIGINAL

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1 §522(f) ("Restated Memorandum") which is exactly like the Memorandum in every regard except that
2 wherever the homestead exemption is referenced as \$50,000 it has been corrected to the proper
3 exemption amount of \$125,000. For ease of reference Exhibit "B" is a red-lined version of the
4 Restated Memorandum.

5
6 Dated: 03-21-00

ROBBINS & KEEHN
A Professional Corporation

7
8
9 By: 

L. Scott Keehn
Lynn M. Beekman
Lisa L. Keehn
Attorneys for Debtor
Sara Newsome Burns

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CSD 1100 [06/19/97]

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

325 West "F" Street, San Diego, California 92101-6991

FILED

00 MAR 14 PM 3:08

CLERK
U.S. BANKRUPTCY CT.
SO. DIST. OF CALIF.

In Re SARA NEWSOME BURNS

Debtor.

BANKRUPTCY NO. 99-33191-B7

AMENDMENT

Presented herewith are the original and one conformed copy of the following [Check one or more boxes as appropriate]:

- ☐ Petition
- ☐ Summary of Schedules
- ☐ Schedule A & B - Schedule of Real or Personal Property
- ☒ Schedule C - Schedule of Property Claimed Exempt
- ☐ Schedule D, E, or F, and/or Matrix, and/or list of Creditors or Equity Holders - REQUIRES COMPLIANCE WITH LOCAL RULE 1009
- ☐ Adding new names or changing addresses - \$20.00 fee required. See instructions on reverse side.
- ☐ Correcting or deleting other information. See instructions on reverse side.
- ☐ Schedule G - Schedule of Executory Contracts & Expired Leases
- ☐ Schedule H - Schedule of Co-Debtor
- ☐ Schedule I - Current Income of Individual Debtor(s)
- ☐ Schedule J - Current Expenditure of Individual Debtor(s)
- ☐ Statement of Financial Affairs

Dated: 3/14/00

Signature L. Scott Keehn
Attorney for Debtor

DECLARATION OF DEBTOR

I, SARA NEWSOME BURNS, the debtor herein, hereby declare under penalty of perjury that the information set forth in the amendment attached hereto, consisting of ___ pages, is true and correct to the best of my information and belief.

Dated: 3/10/00

Sara Newsome Burns
Sara Newsome Burns

EXHIBIT A

COPY

INSTRUCTIONS

- A. Each amended page is to be in the same form as the original but is to contain ONLY THE INFORMATION TO BE CHANGED OR ADDED. Pages from the original document which are not affected by the change are not to be attached.
1. Before each entry, specify the purpose of the amendment by inserting:
 - A. "ADDED," if the information was missing from the previous document filed; or
 - B. "CORRECTED," if the information modifies previously listed information; or
 - C. "DELETED," if previously listed information is to be removed.
 2. At the bottom of each page, insert the word "AMENDED."
 3. Attach all pages to the cover page and, *if a Chapter 7, 11, or 12 case*, serve a copy on the United States Trustee, trustee (if any) and/or the members of a creditors' committee. *If a Chapter 13 case*, serve a copy on the trustee; DO NOT serve a copy on the United States Trustee.
- B. When adding, deleting, or correcting creditor address information, the required mailing list and a Verification of Creditor Matrix, (CSD 1008), must accompany the amendment. The Verification is a separate document. Do not staple it to this Amendment.
- C. Comply with Local Bankruptcy Rule 1009 when adding or correcting the names and/or addresses of creditors or if altering the status or amount of a claim.

AMENDMENTS THAT FAIL TO FOLLOW THESE INSTRUCTIONS MAY BE REFUSED

**** AMENDMENTS FILED AFTER THE CASE IS CLOSED ARE NOT ENTITLED TO A REFUND OF FEES ****

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on 14 day of MARCH 2000, I served a true copy of the within AMENDMENT by [describe here mode of service]

FIRST CLASS MAIL

on the following persons [set forth name and address of each person served] and as checked below:

[XX] Chpt. 7 Trustee:

RICHARD M. KIPPERMAN
P. O. BOX 3939
LA MESA, CA 91944-3939

SEE ATTACHED SERVICE LIST

<p>[XX] For Chpt. 7, 11, & 12 cases:</p> <p>UNITED STATES TRUSTEE Department of Justice 402 West Broadway, Suite 600 San Diego, CA 92101</p>	<p>[X] For Chpt. 13 cases numbered 90-08445 or lower and ODD numbers beginning with 92-01217: THOMAS H. BILLINGSLEA, JR., TRUSTEE 530 "B" Street, Suite 1500 San Diego, CA 92101</p>	<p>[] For Chpt. 13 cases numbered 90-08446 to 92-01215 and EVEN numbers beginning with 92-01216: DAVID L. SKELTON, TRUSTEE 620 "C" Street, Suite 413 San Diego, CA 92101-5312</p>
--	--	--

I certify under penalty of perjury that the foregoing is true and correct.

Executed on 3-14-00
(Date)

Jaime L. Gregory
(Typed Name and Signature)

530 B STREET, SUITE 2400
(Address)

SAN DIEGO, CA 92101
(City, State, ZIP Code)

In Re SARA NEWSOME I CNSCASE NO. 99-33191-B7**SCHEDULE C - PROPERTY CLAIMED AS EXEMPT**

Debtor elects the exemptions to which the debtor is entitled under:

(Check one box)

☐ 11 U.S.C. Section 522(b)(1): Exemptions provided in 11 U.S.C. Section 522(d). Note: These exemptions are available only in certain states.

☒ 11 U.S.C. Section 522(b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION ⁽¹⁾	VALUE OF CLAIMED EXEMPTION ⁽²⁾	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION
Residence	704.730(a)(3)(B)	AMENDED: \$125,000.00	\$290,000.00

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SARA NEWSOME BURNS

8 **UNITED STATES BANKRUPTCY COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 In Re:) **CASE NO. 99-33191-B7**

11 **SARA NEWSOME BURNS, an individual,**) **RESTATED MEMORANDUM OF POINTS**
 12 **Debtor.**) **AND AUTHORITIES IN SUPPORT OF**
 13) **MOTION TO AVOID JUDICIAL LIEN**
 14) **PURSUANT TO 11 U.S.C. § 522(f)**
 15)
 16)

Date: April 10, 2000
 Time: 10:30 a.m.
 Dept: Four (4)

17 **SARA NEWSOME BURNS, the Debtor herein, respectfully submits the following**
 18 **Memorandum of Points and Authorities in support of her Motion To Avoid Judicial Lien Pursuant To**
 19 **11 U.S.C. § 522(f):**

20 **I. INTRODUCTION**

21 Sara Newsome Burns, the Debtor herein ("Debtor"), came into this case with her residence
 22 hopelessly over encumbered by virtue of a colossal and crippling judgment lien resulting from a
 23 breach of contract claim. No objection to her Homestead Claim (or any of her exemptions) was made,
 24 and her entitlement to a ~~\$125,000~~ \$50,000 Homestead Exemption is now fixed and final.¹ However
 25 the massive judgment lien remains ostensibly viable and fully enforceable in the records of the County
 26 Recorder, and will, absent avoidance pursuant to 11 U.S.C. § 522(f), render the Debtor's Homestead
 27

28 ¹ See CCP § 704.730(a)(3)(B); Taylor v. Freeland & Kronz, et al., 503 U.S. 638, 693-645 (1992); and,
In re Alderman (Alderman v. Wilson), 196 B.R. 106, 110 (9th Cir. BAP, 1998).

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Exemption an illusory fiction incapable of nurturing her fresh start on that inevitable day when fortune and circumstance make moving from her current residence either necessary or desirable. Thus the avoidance powers of 11 U.S.C. § 522(f) are appropriately exercised here as an indispensable supplement to her discharge if a real fresh start is to be achieved.

II. FACTUAL STATEMENT²

There is only one encumbrance that stands between the Debtor receiving the benefit of her declared homestead exemption and her fresh start: a judicial lien held by Bradley L. Proulx ("Proulx"). Thankfully, Congress was mindful of the fundamental remedial purposes of the bankruptcy code as it relates to individuals and specifically provided a debtor with the statutory authority to avoid judicial liens when they impair her or his exemption and thereby diminish the debtor's fresh start. 11 U.S.C. § 522(f). With those remedial purposes in mind, the Debtor moves this court to apply the avoidance power bestowed on this Debtor in 11 U.S.C. § 522(f) to avoid the judicial lien to the extent it impairs her declared homestead exemption.

The Debtor has resided in her residence located at 4621 & 4623 Kensington Drive in San Diego, California continually since February of 1997. The fair market value of the residence as of the petition date (8/13/99) is approximately \$300,000.00. The property is subject to a first priority deed of trust lien held by Bank of America ("First Trust Deed") in the approximate amount of \$141,880.00.

Western Family Financial Corp. holds the Second Priority Deed of Trust Lien ("Second Trust Deed") in the approximate amount of \$11,604.00. The next recording in time is the Debtor's declared homestead.

The latest encumbrance on the property was recorded on November 6, 1998 when judgment creditor, Bradley L. Proulx, filed an "Abstract of Judgment" in the amount of \$231,462.61, recorded in the Office of the County Recorder for the County of San Diego on November 6, 1998 as Recorder's File No. 98-0725547 (hereafter the "Judicial Lien"). The amount of the Abstract of Judgment is now approximately \$282,830.00.

/////

² The facts set forth in this portion of the Memorandum are supported by the Declaration of Sara Newsome Burns filed concurrently herewith.

The following table is a reflection of all the liens that currently exist of record on the property and their approximate amounts as of the Petition date:

ENCUMBRANCE	DATE RECORDED	AMOUNT
FIRST TRUST DEED Bank of America	7/20/98	\$141,880.00
SECOND TRUST DEED Western Family Financial Corp.	4/14/97	\$11,604.00
HOMESTEAD FILED	10/02/98	\$50,000.00 \$125,000.00
JUDICIAL LIEN Bradley L. Proulx	11/06/98	\$282,830.00

But for the Judicial Lien, the Debtor would receive the full benefit of her homestead exemption. Luckily, in such circumstances Congress has preserved the sanctity of the otherwise vulnerable homestead: if a judicial lien impairs the exemption, then it is avoidable. 11 U.S.C. § 522(f).

III. DISCUSSION

A. The Avoidance of the Judgment Lien Is Mandated by the Applicable Statutory Formula.

11 U.S.C. § 522(f)(1)(A) permits a debtor to eradicate a judicial lien on her or his property to the extent that the lien impairs the debtor's exemption on that property. Specifically, Section 522(f)(1)(A) provides:

...the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is... a judicial lien...

The Debtor in this case bears "the burden of showing that she is entitled to avoid the lien." In re Pederson, 230 B.R. 158, 160 (9th Cir. BAP 1999). This showing is made by utilizing the "simple arithmetic test" articulated in Section 522(f)(2) which will demonstrate the extent to which the judgment lien impairs the Debtor's homestead. In re Hanger, 217 B.R. 592, 594 (9th Cir. BAP 1997).

/////

EXHIBIT **B**

1 Section 522(f)(2)(A) provides:

2 For the purposes of this subsection, a lien shall be considered to impair
3 an exemption to the extent that the sum of--

- 4 (i) the lien;
5 (ii) all other liens on the property; and
6 (iii) the amount of the exemption that the debtor could claim if there
7 were no liens on the property; exceeds the value that the debtor's
8 interest in the property would have in the absence of any liens.

9 Application of this formula to the facts of this case demonstrates that the Judicial Lien
10 does in fact impair the Debtor's exemption:

11 *Sum of:* \$ 282,830.00 [the Judicial Lien]

12 \$ 153,484.00 [all other liens]

13 ~~\$125,000.00~~ ~~\$50,000.00~~ [homestead exemption amount pursuant to CCP
14 §704.730(a)(3)(B)]

15 ~~\$561,314.00~~ ~~\$486,314.00~~ > \$300,000.00 [fair market value of home]

16 In this case, the sum of ~~\$561,314.00~~ ~~\$486,314.00~~ exceeds the fair market value of the Debtor's house
17 by ~~\$261,314.00~~ ~~\$186,314.00~~; thus, the Judicial Lien impairs the exemption. *See e.g., In re Hanger,*
18 217 B.R. at 595.

19 Using the statutorily mandated formula, the extent of impairment is ~~\$261,314.00~~
20 ~~\$186,314.00~~. *Id.* Thus, Proulx' Judicial Lien, the only lien available for application of 522(f)(1)(A),
21 may be avoided up to ~~\$261,314.00~~ ~~\$186,314.00~~ and Proulx retains a lien in the amount of ~~\$21,516.00~~
22 ~~\$96,516.00~~ (~~\$282,830.00~~ - ~~\$261,314.00~~ ~~\$186,314.00~~). *Id.*

23 **B. The Impairment Formula Reflects a Congressionally Mandated Policy.**

24 The impairment formula discussed above has been mandated by Congress in its
25 adoption of the 1994 Bankruptcy Amendments. Subsection (2)(A) was added to § 522 in the 1994
26 Bankruptcy Amendments to provide a bright-line standard through the use of a specific formula for
27 determining whether a lien impairs an exemption to which the debtor would have been entitled.
28 Congress specifically stated:

"Because the Bankruptcy Code does not currently define the meaning
of the words 'impair an exemption' in Section 522(f), several court
decisions have, in recent years, reached results that were not intended

EXHIBIT B

1 by Congress when it drafted the Code. This amendment would provide
2 a simple arithmetic test to determine whether a lien impairs an
exemption ..."

3 140 Cong. Rec. H. 10769 Section 303 (Oct. 4 1994).

4 Section 522(f)(2)(A) now provides that:

5 For the purposes of this subsection, a lien shall be considered to impair
6 an exemption to the extent that the sum of - -

- 7 (i) the lien;
- 8 (ii) **all other liens on the property;** and
- 9 (iii) the amount of the exemption that the debtor could claim if there were no liens
on the property;

10 exceeds the value that the debtor's interest in the property would have in the absence
11 of **any liens**.

12 [Emphasis added.]

13 As shown above, the application of § 522(f)(2)(A) in this case results in the
14 inescapable conclusion that the Judicial Lien impairs the Debtor's exemption by no less than
15 \$186,314.00. Thus, the Judicial Lien impairs the exemption and may be avoided to the extent of that
16 impairment. See, e.g., In re Hanger, 217 B.R. 592, 595 (9th Cir. BAP 1997). Thus, Proulx' Judicial
17 Lien may be avoided up to \$186,314 and Proulx retains a lien in the amount of \$96,516 (\$282,830-
18 \$186,314). Id. at 595-596. The application of this formula is straightforward. It requires the
19 avoidance of the Judicial Lien to the extent necessary to reduce the sum of all liens plus the allowed
20 Homestead Exemption to a total which is equal to the fair-market value of the property as of the
21 Petition date (Hanger, supra at 595-596; In re Morgan (Morgan v. FDIC), 149 B.R. 147, 153 (9th Cir.
22 BAP, 1993) citing In re Herman, 120 B.R. 127, 130 (9th Cir. BAP, 1990) [value and avoidance
determinations are made as of the petition date]).

23 /////

24 /////

25 /////

26 /////

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28 /////

EXHIBIT B

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Debtor respectfully requests that the Court enter an order
3 establishing Proulx' Judicial Lien be avoided up to ~~\$261,314.00~~ ~~\$186,314.00~~ thereby reducing his lien
4 to ~~\$21,516.00~~ ~~\$96,516.00~~ and providing the Debtor with the benefit of her homestead exemption.

5
6 Dated: 3/24/00

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9 By: 

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